

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7724

Petition of Telephone Operating Company of)
Vermont LLC, d/b/a FairPoint Communications)
("FairPoint"), for approval of a Successor Incentive)
Regulation Plan ("IRP"), pursuant to 30 V.S.A.)
§ 226b)

Order entered: 10/12/2011

PROTECTIVE ORDER RE PREFILED EVIDENCE

I. INTRODUCTION

On May 20, 2011, Telephone Operating Company of Vermont LLC, d/b/a FairPoint Communications ("FairPoint" or "Petitioner"), filed a Motion for Confidential Treatment of Prefiled Evidence concerning portions of Confidential Exhibit FRP-AVCo-1, appended to the prefiled testimony of FairPoint witnesses Edward Vilandrie and Daniel Chu. Specifically, FairPoint states that the redacted portions of the Exhibit contain confidential information that is competitively sensitive and should be maintained as confidential. FairPoint submitted averments to support its request for confidentiality. No party opposed FairPoint's motion. In this Order, the Vermont Public Service Board ("Board") provisionally grants FairPoint's request, with the requirement that FairPoint submit additional justification.

II. DISCUSSION

The Board has reviewed the motion and supporting materials, and concludes that FairPoint has made a *prima facie* showing that confidential treatment is warranted for the information at issue. Therefore, we hereby grant FairPoint's motion for a protective order. However, in the case of the information on Digital Subscriber Line ("DSL") deployment by county, our grant of confidential treatment is on a provisional basis only, subject to the requirement that FairPoint provide additional justification for maintaining the information as

confidential. FairPoint shall submit such justification by October 18, 2011; the Department shall file its position by October 21.

To promote full public understanding of the basis for its decisions, this Board has actively taken steps to limit the amount of information subject to protective orders. We have encouraged parties to remove material from that protection to the extent possible. Since 2001, we have required petitioners seeking a protective order to submit a document-specific (or information-specific) averment of the basis for keeping confidential any document (or information) that they wish to be kept under seal. This arrangement appropriately places a heavy burden on the party seeking confidentiality to justify that decision. It also ensures that counsel for the party seeking confidentiality has actually reviewed and considered the relevant confidentiality factors, as they relate to the specific document or information at issue.¹ Generally, we only resolve disputes about information when there is a genuine disagreement about its confidential nature.² However, even when the motion is uncontested the Board will review the motion and supporting averment or averments to ensure that the moving party has presented a *prima facie* case for keeping the document or information under seal.

In determining whether to protect confidential information, we consider three issues:

- (1) Is the matter sought to be protected a trade secret or other confidential research, development, or commercial information which should be protected?
- (2) Would disclosure of such information cause a cognizable harm sufficient to warrant a protective order?
- (3) Has the party seeking protection shown "good cause" for invoking the Board's protection?³

In the present case, FairPoint asserts that the following portions, which FairPoint considers highly sensitive commercial information, of Exhibit FRP-AVCo-1 should be kept confidential:

1. *Investigation into General Order No. 45 Notice filed by Vermont Yankee Nuclear Power Corporation re: proposed sale of Vermont Yankee Nuclear Power Station to Entergy Nuclear Vermont Yankee, LLC*, Docket No. 6545 ("Entergy Docket"), Order of 11/9/01 at 5-6.

2. *Id.* at 6.

3. See, e.g., *Entergy Docket*, Order of 3/29/02 at 2.

1. Pages 3, 4, 7, 8, 42, 44, 45, 66, 68, and 69 contain customer survey information concerning customers' willingness to change telecommunications carriers. FairPoint contends that this information would permit competitors to better assess pricing strategies designed to retain existing customers or attract new customers, and similarly to understand FairPoint's ability to do so.
2. Pages 3, 4, 20, 45, 55, 56, and 73 contain statements based upon market research concerning market shares of FairPoint and other carriers. FairPoint argues that this information is highly sensitive commercial information because it enables competitors to better assess the extent to which their marketing and other efforts to gain customers are successful.
3. Pages 3, 4, 35, 36, and 64 contain FairPoint DSL information by county. FairPoint asserts that such information would enable competitors to assess counties not served by FairPoint, which would allow them to identify markets for build-out or otherwise adjust marketing, sales, and build out strategies based on this information.

FairPoint asks that we keep the information confidential for at least five years.

We have reviewed the motion and supporting materials, and we have applied the existing standard. We conclude that the first two categories of redacted information are commercially sensitive information that should be protected, that disclosure would cause a cognizable harm sufficient to warrant a protective order, and that there is good cause for protecting the information. Therefore, FairPoint has made a *prima facie* showing that confidential treatment is warranted for the information at issue, and we grant FairPoint's motion for a protective order for these categories.

As to the information concerning FairPoint's deployment of DSL, by county, we also find good cause for protecting the information, but only on a provisional basis. We recognize that companies have desired to keep such information confidential. During the recent efforts by the federal government to map the deployment of broadband nationally, detailed information on broadband deployment by company has also been kept confidential. However, FairPoint has not adequately explained how DSL deployment, particularly at the county level (as opposed to by individual households) provides a competitor with any real advantage that would produce cognizable harm. The national broadband mapping already shows DSL deployment at the census block level, more granular than the county-level information. Considering the limited number of companies offering the broadband services in Vermont, it would not be hard to discern where

FairPoint's DSL deployment is more robust. Moreover, half of FairPoint's exchanges already have 95% broadband availability; this information is public.

If FairPoint seeks to maintain confidential treatment for the DSL deployment information, it must file additional justification for such treatment. The Board requests that the Department also file a statement explaining its position on the confidentiality of the DSL information. These filings must be submitted by October 21, 2011. The Board will address the confidentiality of the DSL deployment levels at the outset of hearings on October 25.

In addition, we have consistently reminded parties who seek confidential treatment for materials that they have a continuing obligation to reexamine protected information and to release material that would not cause competitive harm, or that has otherwise been made public (even during the course of this proceeding), particularly testimony and exhibits. We expect FairPoint to do the same here. At this time, we are not explicitly ruling that any specific information should remain confidential indefinitely. Parties retain the ability to challenge whether information encompassed by this ruling should be removed from the special protections we adopt in this Order or removed from protection as confidential information.

III. ORDER

Therefore, IT IS HEREBY ORDERED that the Confidential Information provided by FairPoint (as described in FairPoint's Motion) shall be treated in this proceeding as follows:

1. All testimony, affidavits, transcripts, exhibits, and other documents that are subject to this Order as confidential information, and any documents that discuss or reveal documents that constitute confidential material, shall be placed in a sealed record by filing such information in sealed envelopes or other appropriate sealed containers on which shall be endorsed the caption and docket number of the proceeding, the nature of the content (*e.g.*, exhibit, report, etc.), and a statement that it shall not be opened or released from the custody of the Clerk of the Board except by Order of the Board. Notwithstanding such a statement, the members of the Board, any employee or consultant specifically authorized by the Board to assist the Board in this proceeding, and any Hearing Officer appointed to this Docket may have access to such sealed

confidential information, but shall not disclose such information to any person. The material shall be kept confidential for a period of five years.

2. At hearing or conference in this proceeding, no persons, other than those who have signed or agreed to be bound by this Order and the Protective Agreement approved in the Order of June 8, 2011, and those whom the Board has expressly authorized to have access to this confidential information, shall be permitted to give, hear or review testimony given or held with respect to this confidential information.

3. Each Board stenographer or reporter in this proceeding shall acknowledge and be bound by this Order. Each such Board stenographer or reporter shall be instructed to and shall start a separate transcription for testimony or discussion on the record of confidential information. Such transcription shall be marked "Confidential" and shall be sealed and filed with the Clerk of the Board, and copies of the same shall be made available only to those persons authorized to view such information. Such transcription shall, in all other respects, be treated as confidential information pursuant to this Order.

4. The Board retains jurisdiction to make such amendment, modifications and additions to this Order as it may, from time to time, deem appropriate, including any such amendments, modifications or additions resulting from a motion made pursuant to the Protective Agreement. Any party or other person may apply to the Board for an amendment, modification or addition of this Order.

5. By October 18, 2011, if FairPoint seeks continued protection for the information on DSL deployment by county, it shall file additional justification for such treatment that addresses, at a minimum, the issues raised in this Order. The Department shall file its response by October 21, 2011.

Dated at Montpelier, Vermont, this 12th day of October, 2011.

<u>s/James Volz</u>)	
)	PUBLIC SERVICE
)	
<u>s/David C. Coen</u>)	BOARD
)	
)	OF VERMONT
<u>s/John D. Burke</u>)	

OFFICE OF THE CLERK

FILED: October 12, 2011

ATTEST: s/Susan M. Hudson
 Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)